88-607

Supreme Court, U.S.
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Supreme Court of the United States

JOSEPHINE WEIGNER,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR CERTIORARI

THE QUESTIONS PRESENTED FOR REVIEW

(1)

UNDER PRESENT DAY CONCEPTS OF DUE PROCESS, IS NOT JURISDICTION *IN REM* AGAINST A CITIZEN OF ANOTHER STATE WITHIN THE UNITED STATES, AS THE SOLE BASIS FOR COMMENCEMENT OF AN ACTION TO FORECLOSE REAL PROPERTY, UNAVAILABLE WHERE THAT CITIZEN HAS KEPT THEIR CORRECT NAME AND ADDRESS DULY ON FILE?

(2)

ISN'T PROOF OF AT LEAST AN ATTEMPT TO SERVE SUMMONS BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR PROOF OF SOME OTHER REASONABLE ATTEMPT AT ACTUAL NOTICE, A MINIMUM PREREQUISITE TO THE TAKING OF REAL PROPERTY IN TAX FORECLOSURE WHERE THE PROPERTY OWNER'S NAME AND ADDRESS IS CURRENTLY AND CORRECTLY LISTED?

(3)

ARE NOT THE LAWS SUFFICIENTLY UNCLEAR IN THIS AREA, AS ILLUSTRATED BY THE EXCELLENT OPINIONS OF THE MAJORITY AND MINORITY BELOW, TO NECESSITATE REVIEW BY THIS COURT?

The Questions Presented for Review, cont.

(4)

ISN'T NEW YORK CITY'S *IN REM* TAX FORECLOSURE STATUTE UNCONSTITUTIONAL FOR FAILURE TO ACCORD PROCEDURAL DUE PROCESS TO OWNERS WHOSE NAMES AND ADDRESSES ARE CORRECTLY LISTED?

(5)

SHOULDN'T THE COURT SPEAK TO THE GROUNDSWELL OF OPINION WHICH HAS ARISEN DURING THIS 200th ANNIVERSARY OF THE ENACTMENT OF THE U.S. CONSTITUTION CONCERNING PROCEDURAL DUE PROCESS DEFECTS OF THE PRACTICE OF THE USE OF PUBLICATION AGAINST TAXPAYERS WHOSE NAME AND ADDRESS ARE KNOWN?

(6)

IS NOT DEFENDANT CITY'S FOUR-MONTH PERIOD FOR REDEMPTION FROM TAX FORECLOSURE A NON SELF-EXECUTING STATUTE OF LIMITATIONS WHICH, UNDER RULES LAID DOWN BY THIS COURT, CANNOT BECOME EFFECTIVE WITHOUT ACTUAL NOTICE AT LEAST TO THOSE OWNERS WHOSE NAMES AND ADDRESSES ARE CURRENTLY AND CORRECTLY LISTED?

The caption of this case contains the names of all parties to the proceeding in the courts below.

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Supreme Court of the United States

JOSEPHINE WEIGNER,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IS REPORTED AS FOLLOWS:

WEIGNER v. CITY OF NEW YORK,
852 F.2d 646 (2nd Cir. 1988).

THE DECISION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK IS REPORTED AS FOLLOWS:

WEIGNER v. CITY OF THE NEW YORK,
668 F. Supp. 135 (E.D.N.Y. 1987).

STATEMENT OF JURISDICTIONAL GROUNDS

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SOUGHT TO BE REVIEWED WAS DATED JULY 14th, 1988 AND IT WAS FILED THAT DATE.

THERE WAS NO PETITION OR ORDER RESPECTING A REHEARING.

THIS PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS SECOND CIRCUIT IS FILED WITHIN NINETY (90) DAYS OF THE DATE OF ENTRY OF THE JUDGMENT APPEALED FROM.

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

UNITED STATES CONSTITUTION, AMENDMENT 5

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

STATUTES (cont.)

UNITED STATES CONSTITUTION, AMENDMENT 14

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILIGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO AN PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATUTES, (cont.)

ADMINISTRATIVE CODE OF THE
CITY OF NEW YORK
§ 11-407 (formerly § D17-7.0)

c. When the time to redeem in an in rem tax foreclosure action has expired, any person claiming to have an interest in a parcel included in said action shall have the right to make a late redemption payment to the commissioner of finance. Such late redemption payment shall consist of all taxes and charges owing on said parcel, the lawful interest thereon to the date of payment and a penalty of five percent of said payment of taxes, charges and interest, which penalty may not exceed five hundred dollars as to each parcel on which a late redemption payment is being made. Such late redemption payment shall be made in cash or by certified or bank check and shall be accepted by the commissioner of finance at any time after the last day to redeem up to the date on which the commissioner is advised by the corporation counsel that the preparation of the judgment of foreclosure in the in rem action has been commenced. Upon receipt of such late redemption payment, the commissioner of finance shall issue a certificate of withdrawal pursuant to the provisions of section 11-413 of this chapter.

STATUTES (cont.)

ADMINISTRATIVE CODE OF THE
CITY OF NEW YORK
§ 11-412 (formerly § 17-12.0)

c. Every deed given pursuant to the provisions of this section shall be presumptive evidence that the action and all proceedings therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the recording of such deed, the presumption shall be conclusive, unless at the time that this subdivision takes effect the two year period since the recording of the deed has expired or less than six months of such period of two years remains unexpired, in which case the presumption shall become conclusive six months after this subdivision takes effect. No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive as aforesaid.

STATUTES, (cont.)

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 11-416 (formerly D17-16.0)

§ 11-416 Owner's registration cards; mailing tax bills and notices to registered owners or their designees. a. The commissioner of finance shall maintain a file of owner's registration cards submitted by owners of real property. Each such owner's registration card shall be signed by the owner or a duly authorized representative and shall state the date on which it was filed, the owner's full name and post office address and a description of the premises by reference to the section, block, and lot numbers on the tax map.

b. The commissioner of finance shall mail bills for taxes, charges and assessments to all owners who have filed owner's registration cards as herein provided, but the failure of the commissioner of finance so to mail such bill shall not invalidate or otherwise affect the tax, charge or assessment represented thereby nor prevent the accruing of any interest or penalty imposed for the non-payment thereof, nor prevent or stay proceedings under this chapter, nor effect the title of the plaintiff or any purchaser under such proceedings.

c. The commissioner of finance shall also mail notice of foreclosure and any other process required by this chapter to all owners who have filed owner's registration cards whenever the parcels as to which such cards were filed are included in a

STATUTES, (cont.)

list of delinquent taxes filed pursuant to this chapter. The failure to receive such notice or process as herein provided shall not affect the validity of any action or proceeding brought pursuant to this chapter.

d. An owner who files an owner's registration card may also designate thereon the full name and post office address of a mortgagee, lienor or other person to receive bills and notices. Where such designation is made, the commissioner of finance shall not mail any bills and notices to the owner but shall mail all bills and notices to the owner's designee.

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK
§ 11-417 (formerly § D17-17.0)

§ 11-417 In rem cards; mailing notices to other interested persons. a. The commissioner of finance shall, in addition to the file maintained by him or her pursuant to section 11-416 of this chapter, maintain a file of in rem cards submitted by any person having an interest in real property who is not entitled to have tax bills mailed to him or her by the commissioner of finance, including mortgagees, lienors, encumbrancers and owners who have filed owner's registration cards designating someone else to receive bills and notices. Each such in rem card shall be signed by the person filing such card or a duly authorized representative, shall contain a description of the premises by reference to the section, block and lot numbers on the tax map and shall state the date on which said card was filed, the full name and post office address of the person filing said card and the nature of the interest said person has in said premises.

STATUTES, (cont.)

b. The commissioner of finance shall mail a notice of foreclosure and any other process required by this chapter to each person who has filed an in rem card whenever the parcels to which such cards refer are included in a list of delinquent taxes filed pursuant to this chapter. However, failure to receive such notice or process shall not affect the validity of any proceeding brought pursuant to this chapter.

ADMINISTRATIVE CODE OF THE
CITY OF NEW YORK
§ 11-424 (formerly § D17-25.0)

§ 11-424 Application to the city for release of property acquired by in rem tax foreclosures. a. The city's interest in property acquired by in rem tax foreclosure may be released pursuant to this section on the application of any party who had an interest in said property as either owner, mortgagee, lienor or encumbrancer at the time of the city's acquisition thereof where such application is made at any time up to two years from the date on which the deed by which the city acquired title to said property was recorded or within two months of the effective date hereof with respect to property to which the city's deed was recorded no more than three years prior to the effective date hereof.

* * * *

f. If an application pursuant to this section, and the documents required by subdivision c of this section in support thereof, are filed within four months after the date of the city's acquisition of the subject property, said application shall be granted providing the corporation counsel approves

STATUTES, (cont.)

the application as to form, timeliness and eligibility of the applicant and providing the applicant has paid all amounts required to be paid by subdivision d of this section within thirty days of the date on which a letter requesting applicant to make such payment is mailed or delivered to the applicant.

g. If an application for a release of the city's interest in property acquired by in rem tax foreclosure, and the documents required by subdivision c of this section in support thereof, have been filed within the time allowed in subdivision a of this section, but more than four months after the date of the city's acquisition the board of estimate may, in its discretion, authorize the release of the city's interest in said property pursuant to this section, providing the application has been approved by the corporation counsel as to form, timeliness and eligibility of the applicant and providing the city has not sold or otherwise disposed of said property and providing further that said property has not been condemned or assigned to any agency of the city and is not the subject of contemplated use for any capital or urban renewal project of the city.

STATEMENT OF FACTS

For the sake of clarity, Appellant hereby utilizes the facts set forth in the majority and minority opinions below. References (A-1) etc. are to page numbers of the appendix herein. The parts of the footnotes of the opinions below which contain facts are reproduced and they are numbered as in the opinion below, Appellant's footnotes are lettered: (A) through (J).

Josephine Weigner appealed from a judgment of the District Court for the Eastern District of New York (Henry Bramwell, Judge) granting summary judgment against her in a diversity suit challenging the constitutional validity of tax lien foreclosure procedures of the City of New York. Weigner argued that the notice by first class mail furnished pursuant to the City's Administrative Code was inadequate under the Due Process Clause of the Fourteenth Amendment. She argued that, at a minimum, due process requires notice by certified mail, return receipt requested, to property owners who risk tax lien foreclosure of their interests in real estate. Additionally, Weigner contended that the City's notice of foreclosure was inadequate under state law and that the Board of Estimate improperly denied her application for a discretionary release of the city's interest in the property after the deed of foreclosure was entered. (The majority below) concluded that notice sent by ordinary mail of the pendency of the tax lien foreclosure proceeding is all that the Constitution requires. (The majority below) also rejected Weigner's claims regarding the adequacy of notice under state law and the Board of Estimate's decision to deny a release.(A-2)

FACTS, (cont.)

Josephine Weigner is a resident of Florida. Between 1959 and 1962 she acquired a group of fourteen vacant parcels of land in South Jamaica, Queens, New York. Weigner failed to pay property taxes on the lots beginning in 1977. On October 1, 1981, the City of New York commenced an *in rem* tax foreclosure action against all real property in Queens on which real estate taxes had not been paid for a year or more. Weigner's fourteen lots were among the 5,229 parcels in this proceeding. At the time the action was commenced, Weigner owed approximately $21,000. in back taxes.(A) The market value of the fourteen lots is estimated by the parties to be between $151,000. and $250,000.

Pursuant to the City's Administrative Code, notices of the commencement of the tax foreclosure action were mailed to Weigner at her home in Florida. The City had Weigner's address because she had filed with the Commissioner of Finance an "*in rem* card," which enables the City to mail a notice to the designated address in the event that properties listed on the card are included in an *in rem* tax foreclosure action. Administrative Code § 11-417 (Lenz & Riecher 1986). City records reveal that on October 1, 1981, notice of tax lien foreclosure was sent to Weigner by ordinary first class mail.[1] The parties dispute whether Weigner received these notices.[2]

(A) More than half of that sum was interest and penalty money added to compensate for late payment and $1,400. of it was a redemption application fee which respondent retained after denying the redemption applications.

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[1] The notices were sent with respect to 13 of the 14 parcels owned by Weigner. The 14th parcel is a narrow strip of land, and Weigner has acknowledged that whatever ruling is made with respect to the 13 parcels for which notice was mailed should govern the 14th parcel.

[2] The City presented evidence of its practices concerning the mailing of foreclosure notices. Weigner denies that she ever received legal papers, although she admitted receiving "tax bills and other form letters" concerning overdue taxes on her Queens Property. (A-3)

FACTS, (cont.)

The "Notice of Foreclosure" sent to Weigner was a form letter that apprised "[a]11 persons having or claiming to have an interest in the real property" described on a list of tax delinquent parcels, that a foreclosure action had been commenced against the parcels. The notice indicated that the property could be redeemed on or before December 18, 1981. The notice further stated that anyone who failed to redeem his property would be "forever barred and foreclosed" of any right in the property "except for the remedies provided in Sections D17-7.0(c) and D17-25.0 of the Administrative Code." Section D17-7.0 (c) (now renumbered as section 11-407 (c)) permits the late redemption of property after the redemption date, but prior to entry of a judgment of foreclosure. Section D17-25.0 (now renumbered as section 11-424) permits the "release" of the City's interest in property after entry of a judgment of foreclosure. An application for release must be made within two years from the date the City's deed of foreclosure is recorded. A release application made within four months of the City's deed, "shall be granted," provided that it is timely and the applicant pays all back taxes, penalties, and interest. Administrative Code § 11-424(f). An application made after four months and prior to two years is within the discretion of the Board of Estimate. Administrative Code § 11-424 (g)

Weigner failed to redeem her property by the December 18, 1981, deadline, nor did she request a late redemption. On March 6, 1984, a judgment of foreclosure was entered in the action. The City took title to the properties pursuant to a deed recorded on March 15, 1984. That gave Weigner until July 15, 1984, to apply for a mandatory release and until March 15, 1986, to apply for a discretionary release. (A-4)

FACTS, (cont.)

On March 12, 1986, just three days short of the two-year discretionary release deadline, (B) Weigner filed release applications with respect to each of her fourteen parcels. After informing Weigner that her case for a discretionary release was weak, giving her an opportunity to submit more evidence, and holding a hearing, the Board of Estimate denied her applications.

Weigner initiated the present suit on October 22, 1986. Her complaint alleged that she received inadequate notice of the foreclosure proceeding and that by denying her release applications the Board of Estimate discriminated against her as an out-of-state resident and otherwise abused its discretion. The District Court granted summary judgment for the City. 668 F.Supp. 135 (1987). The Court found that due process was satisfied because Weigner actually received notices of foreclosure.[3] The District Court further concluded that Weigner's equal protection claim lacked a factual basis and that the Board of Estimate had not abused its wide discretion under state law in denying her release applications. (A-5) However, because this case comes before the court on a question of denial of trial on the issues, her claim raises the issue whether

(B) Weigner claimed she was advised by defendant's officials, since she had not applied within the four-month period, she could file any time up to two years without further prejudicing her case.

[3] The District Court's finding that notices were received was limited to the 13 parcels as to which notices had been sent. See footnote 1, supra. With respect to the 14th parcel, for which notice was not sent, the District Court ruled that Weigner's claim was barred by the two-year statute of limitations. See Administrative Code § 11-412 (c). Because . . . Weigner has agreed that the disposition with regard to the 13 parcels should govern the 14th parcel, we need not consider the statute of limitations issue. (A-5)

FACTS, (cont.)

due process requires that notice of a tax lien foreclosure must not only be mailed to a property owner but must also be received. (A-6) (See Footnote H).

The Supreme Court has yet to be squarely presented with the question whether certified or registered mail, as opposed to first class mail, is required to constitute actual notice. (A-17)

Here the parties dispute whether the notice was ever received. Weigner, [a widow] (C) living in Florida, owned property in a rundown section of Queens. She had paid her taxes up to 1977 (and 1980 as to one parcel) except for a brief period when she held the property as mortgagee, having sold it to an unsuccessful developer, and even then she paid back taxes when she reacquired it from the buyer. Actual arrearages were only $9,259., although $21,927. in interest, subsequent taxes, penalties, etc., was owed on the property which was worth, in the 1980's, $183,000. according to the City and more than $250,000. according to Weigner. The notice (which she does not remember receiving) was a form letter on which her name does not appear, her pieces of property are not specified, and the word "summons" is conspicuously absent. The form "notice of foreclosure" simply refers to "In Rem Tax Foreclosure Action No. 38" in the Borough of Queens and says that the Commissioner of Finance has filed with the clerk of a court "a list of parcels of property affected by unpaid tax liens. . . which on the 1st day of October, 1981, had been unpaid for a period of at least one year" and went on to specify, in writing-like typeface,

(C) Josephine Weigner is not a widow. Judge Oakes apparently took the mistaken impression that she is a widow.

FACTS, (cont.)

December 18, 1981, as the last day of redemption. Queens Action No. 38 involved 5,229 tax delinquent parcels. (A-19-20)

Moreover, the City did *not* send *any* notice of the entry of the foreclosure judgment, any notice of the recording of the tax foreclosure deed, or any notice of the pending expiration of Weigner's rights to redeem within the four-month mandatory release period thereafter. (A-21) (D)

New York City Administrative Code § 11-424(g) permits the Board of Estimate in its "discretion" to authorize the "release" (A-21) of the City's interest in the property foreclosed to the taxpayer who properly applies and pays all due charges during the period from four months to twenty-four months after the deed of foreclosure is recorded. (For the first four months there is a mandatory release.) The only restraint on this discretion is that it cannot be exercised if the City has sold or disposed of the property, if the property has been condemned or assigned to any agency of the City, or if it is the "subject of contemplated use for any capital or urban renewal project of the City." Weigner duly filed her applications for release but, according to the City's affidavit in support of its motion for summary judgment, she was turned down because the vacant land was "on disposition hold" because it was submitted to the Mayor's office as "potential Affordable Houses Sites" and because she lacked any plans for the sites. (A-21-22).

(D) Unlike most tax default procedures, in which a tax lien is first taken, the New York City *In Rem* Tax Foreclosure procedure takes the form of an immediate court action commenced not by the taking of a tax lien but by a summons issued out of the New York State Supreme Court. It is the lack of due service of this process (it was served by publication) which appellant insists, is unconstitutional.

REVIEW SHOULD BE ALLOWED IN THIS CASE FOR SEVERAL IMPORTANT REASONS.

I

THE LENGTHY AND WELL-PREPARED MAJORITY AND MINORITY OPINIONS BELOW SHOW TWO SIDES OF AN IMPORTANT QUESTION WHICH OUGHT TO BE RESOLVED.

The majority opinion below, while it reaches what appellant obviously believes to be the wrong conclusion, sets forth with excellent precision and detail what must seem to many to be the general rule; namely, that service of summons by publication against a defendant absentee landowner whose name and address is known is procedurally acceptable, provided some ordinary mail warning notice is delivered to the U.S. mails at the same time.

The opinion below is a worthy presentation of the argument that constructive notice, (E) in tax foreclosure cases, where defendant's name and address are registered with the taxing authority, is acceptable under this nation's concept of procedural due process.

Justice Newman, writing for the majority readily admits, however, that the constructive notice method may be harsh:

> "Importantly, the state's obligation to use the notice 'reasonably certain to inform those afffected' does not mean that all risk of non-receipt must be

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(E) Constructive notice is notice or knowledge of a fact imputed by law to a person. BLACK'S LAW DICTIONARY p. 1258 (3rd Ed. 1933).

> eliminated: 'Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt justice will be done.' " (citing a quote taken from BLINN v. NELSON, 222 U.S.1, 7 (1911). (A-7) (F)

Justice Newman also admits that the use of certified mail, return receipt requested would be a much better procedure. (A-8)

Justice Oakes, on the other hand, finds that procedural due process mandates more on the part of the tax collector than just publication of the summons and an ordinary mailing of a warning without any attempt at actual notice. (G) Justice Oakes maintains that due process required that the summons in this case should have been mailed (not just published) by means reasonably designed to assure its receipt.

Appellant respectfully urges that Justice Oakes' opinion is not in advance of its time, but it might take a considered

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(F) In BLINN v. NELSON, 222 U.S. 1, 32 S.Ct. 1, 56 L.Ed. 65 (1911) the Court was dealing with a person who had not been heard from in fourteen years. How can that rule be comparable to the situation at bar where names and addresses are duly and currently registered? Admittedly due process does not require personal service in every case. But must we tolerate lack of reasonable attempts at actual notice on the authority of a 1911 case which dealt with a 14 year absentee?

(G) Actual notice is defined as notice expressly and actually given, and brought home to a party directly. Actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he or she is presumed to have received personally because the evidence within his or her knowledge was sufficient to put him or her upon inquiry. BLACK'S LAW DICTIONARY, *supra.*

opinion of this Honorable Court to show that a tax collector, proceeding by way of a tax foreclosure action, does not have the right to rely upon constructive notice; that in cases where the citizen taxpayer takes the trouble to keep his or her name and address registered, decisions of this Court already mandate that the tax collector take additional steps to assure *actual notice.* MULLANE v. CENTRAL HANOVER BANK & TRUST CO., 339 U.S. 306, 70 S.Ct. 652 (1950), MENNONITE BOARD OF MISSIONS v. ADAMS, 462 U.S. 791, 103 S.Ct. 2706 (1983) cf. TULSA COLLECTION SERVICES v. POPE, 56 U.S.L.W. 4302 (U.S. Apr. 19, 1988), 99 L.Ed 2d 565 (1988)

II

THE U.S. CONSTITUTIONAL QUESTIONS FOR WHICH REVIEW IS SOUGHT HEREIN, HAVE BEEN THE SUBJECT OF CONSIDERABLE ATTENTION IN THE HIGHEST COURTS OF THE STATE OF NEW YORK AND MERIT REVIEW

The highest courts of the State of New York have been quite outspoken, in recent opinions, on the questions sought to be reviewed in this appeal; perhaps prompted by the coincidence in time of the celebration of the 200th anniversary of the U.S. Constitution. Examples are as follows:

Excerpts from the dissenting opinon of Hon. Leon Lazer in McCANN v. SCADUTO, 123 AD2d, 111 at 118 et. seq. 510 NYS2d 149 at 154 et seq. (2nd Dep't, Dec. 31, 1986) rev'd (partially in accord with Judge Lazer's dissent) 71 NY2d 164, 519 NE2d 309, 525 NYS2d 298 (1987)

> "Prior to the mid-twentieth century, it was traditionally accepted that notice by publication was constitutionally adequate under certain circumstances." (510 NYS2d 149 at 156)
>
> . . . .

"Landowners were considered under a special obligation to keep themselves informed about events concerning their land, and regular monitoring of newspapers in their locales was an incident of this obligation." (citation omitted Id. at 157)

. . . .

"The latter part of this century has seen a significant transformation of due process concepts." (Id.)

. . . .

"Among the areas rather radically affected are the traditional ones relating to methods of service considered constitutionally adequate to provide notice of events affecting interests in property. (see MENNONITE BD. OF MISSIONS v. ADAMS, 462, U.S. 791, 103 S.Ct. 2706, 77 L.Ed2d 180."(Id.)

. . . .

"[I]t is now beyond dispute that as to persons whose identity and address are known or readily ascertainable, notice by publication is inadequate to meet the demands of due process." (Id. at 158)

. . . .

"Any doubt that a different standard could be justified for notice where tax proceedings were involved were dispelled in 1983 by MENNONITE BD. OF MISSIONS v. ADAMS, 462 U.S. 791, 103 S.Ct. 2706, supra, when the Supreme Court held that the notice by publication of a tax lien sale did not meet the requirements for due process for a holder of a real property interest." (Id. at 159)

Hon. Leon Lazer, concurring in part and dissenting in part in McCANN v. SCADUTO, 123 AD2d, 111 at 118 et. seq. 510 NYS2d 149 at 154 et seq. (2nd Dep't, Dec. 31, 1986) rev'd (partially in accord with Judge Lazer's dissent) 71 NY2d 164, 519 NE2d 309, 525 NYS2d 298 (1987)

In the N.Y. Court of Appeals, writing for the majority of that court in the combined appeals of the McCANN v. SCADUTO case and RINALDO v. STONE, 71 NY2d 164, 510 NYS2d 398 (1987) Justice Judith S. Kaye, on Dec. 23, 1987, wrote:

> "While continuing to retain some validity today, the concept that petitioner affords due notice in all *in rem* proceedings has been markedly eroded over time." (71 NY2d 164 at 173)

> "We recognize that what is reasonable for purposes of Notice is unusually a legislative policy determination; however, whether legislative choice passes constitutional muster is a decision for the courts." (Id. at 177)

See generally, DEVELOPMENT OF THE CONCEPT OF DUE NOTICE IN PROCEEDINGS AFFECTING PROPERTY set forth in the opinion McCANN v. SCADUTO and RINALDO v. STONE, supra 71 NY 164 at 172, 516 NYS2d 399 at 401.

Appellant respectfully urges that the foregoing are examples of an outpouring of thought and opinion concerning this vital area of Constitutional Law. (H) They represent a

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(H) The McCANN-RINALDO decisions, supra, hold unconstitutional the notice provisions of the Nassau Co., N.Y. tax foreclosure law which provided for a tax lien sale pursuant to notice served by publication; and, after the liens were sold and a two-year redemption period had elapsed, a three-month period of further notice served by certified mail with return receipt requested. Even such quantum of notice, which far exceeds that of the case at bar, was held to be constitutionally insufficient. The majority decision below at footnote 6, (A-11), and at (A-6) misconstrued appellant's case. Appellant claims that actual notice must at least be given in order to satisfy due process requirements. If, after diligent attempts, actual notice is not received constructive notice will suffice. In the case at bar however, no attempts at actual notice were made. The McCANN-RINALDO case holds they should have been made.

considerable amount of research on the subject, and warrant attention, through the medium of a Writ of Certiorari in the case at bar.

III

THE NEW YORK CITY *IN REM* TAX FORECLOSURE STATUTE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO ACCORD DUE PROCESS.

The attorneys for the defendant CITY OF NEW YORK, in their answering Brief in the Court below have readily admitted that the CITY relies upon jurisdiction over appellant WEIGNER by service of summons by publication:

> "Jurisdiction in the underlying tax foreclosure action was *in rem*, obtained by virtue of the subject properties' presence within the State. Service of a summons on property owners was, therefore, unnecessary." (Respondent's answering brief below, p. 34.)

They argue that *MENNONITE* does not require actual notice to a property owner, nor mail service of summons; and that the mere mailing of a notice by regular mail without any attempt whatsoever to try to see to it that such mailing is actually received, coupled with service of summons by publication, is all that is required. They must make that argument in order to try to sustain the constitutionality of the New York City *in rem* foreclosure statute; for not only does it provide for an ordinary mailing of a warning notice (not a summons) to a registered owner, but it provides, contrary to the clear rule of *MULLANE* and *MENNONITE*, that the CITY OF N.Y. has no obligation whatsoever to try to see to it that the ordinary mailing is received:

> "However, failure to receive such notice or process shall not affect the validity of any proceeding brought pursuant to this chapter." § 11-417 N.Y. City Administrative Code (formerly § D17-17.0) See also § 11-416 (f'ly § D17-16.0) to the same effect. (p. 6 to 8 supra)

The spirit of the above-quoted provisions is ONE HUNDRED EIGHTY DEGREES away from the thrust of the rule of *MULLANE* and *MENNONITE*, which makes notice such as that which would be given by one desirous of actually informing the absentee a constitutional requirement. *MULLANE*, supra, at 315; 70 S.Ct. at 657.

Picture, if you will, the City's mailroom clerk in receipt of a mailbag full of returned mailed notices, asking his superior what should be done with them. Under N.Y. City's § 11-416 and § 11-417, the superior's proper reply is "throw them in the garbage". Under *MULLANE* and *MENNONITE*, the superior's proper reply would be "make sure you make further and reasonable attempts to get the message to each taxpayer, and especially those who have kept their name and address duly and correctly listed with us."

Petitioner respectfully urges that we need this Court's assistance in laying down a rule which will make it clear to those mailroom clerks and their superiors that where procedures require, those notices must all be in the form of summonses, and that they must be sent either by certified or registered mail with return receipt requested, or by regular mail with return receipt and postage such as that which is provided for by Fed. R. Civ. P. 4(c) (2) (C) (ii) & 4 (d), or by some other means reasonably certain to give actual notice. (See MILES v. DISTRICT OF COLUMBIA, 354 F.Supp. 577, 583-85 (D.D.C. 1973), aff'd 510 F.2d 188 (D.C. CIR. 1975). Only then will the taxing authority's obligation under

MENNONITE and *MULLANE*, to act as if they actually wanted to get the message to the taxpayers, be fulfilled.

A substantial argument can also be made for the proposition that the degree to which notice must be given under concepts of due process differs depending upon the severity of consequences of failure to receive notice and the type of individuals involved. "In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes." MULLANE v. CENTRAL HANOVER BANK & TRUST CO., *supra*, 339 U.S. 306 at 319, 70 S.Ct. 652 at 660. In this respect TULSA COLLECTION SERVS. v. POPE, *supra*, which appears to hold that an ordinary first class mailing to known creditors is sufficient (99 L.Ed2d 565, at 578), lays down such requirement only for the purpose of holding the Estate Representative responsible for the debt. *Id.* In many States failure of the Estate Representative to pay a claim does not discharge the debt, it merely relegates the creditor to collection proceedings against the distributees. See N.Y. ESTATES POWERS AND TRUST LAW § 12-1.1 (CLS 1979 & Supp. 1987) Therefore, a requirement for an ordinary mailing to an Estate's known creditors in addition to publication, without further attempts to make sure which notice was received, is different, in many cases from the case at bar.

Petitioner respectfully urges that until this Court hands down a definitive decision, many taxing authorities, and other plaintiffs in similar situation, will fail to live up to their obligation to use best efforts to give actual notice as required by the rules of due process.

IV

A MORE PRECISE DEFINITION OF ACTUAL NOTICE BY USE OF THE UNITED STATES MAILS IS NEEDED.

The U.S. Supreme Court has traditionally avoided responsibility to prescribe specific forms of service of process. GREENE v. LINDSEY, 456 U.S. 444 at 455 n. 9, 102 S.Ct. 1874 at 1880 n. 9 (1982) see also MENNONITE dissenting opinon of Justice O'Connor, 462 U.S. 791 at 801, 103 S.Ct. 2706 at 2713 (1983), but see GREENE v. LINDSEY, 456 U.S. 444 at 460, 102 S.Ct. at 1883, dissenting opinion of Justice O'Connor at footnote 2. Why then should the Court do so with respect to certified mail with return receipt requested, or some other form of mailing which provides a receipt at this time? Answers are as follows:

1. The rule is not precise—

"The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." MULLANE v. CENTRAL HANOVER BANK & TRUST CO., supra 339 U.S. 306, 315

That standard is imprecise. Taxing Authorities or others serving process are left to their own choices for the meaning, in each case, of the words ". . . desirous of actually informing the absentee . . . ." Id.

This case illustrates the fact that the tax collector is left with a certain dilemma of conscience as to whether or not the law requires him to do more than just send out one ordinary mailing. Appellant respectfully urges that the granting of a Writ of Certiorari herein will present the Court with an

opportunity to make it clear to tax collectors across the U.S. that if they don't exercise reasonable attempts at actual notice by use of the U.S. Mails, they do not comply. Just putting dummy form letter type notices in an ordinary mailing to registered taxpayers is not compliance with the Constitutional requirements of procedural due process.

2. There is some confusion even within the language of cases handed down by this Court as to whether or not ordinary first class mail is adequate. Compare Justice O'Connor's dissent in GREENE v. LINDSEY, *supra*—

> ". . .the advantages of the mails over posting if any, are far from obvious. It is no secret, after all, that unattended mailboxes are subject to plunder by thieves. Moreover, unlike the use of the mails, posting notice at least gives assurance that the notice has gotten as far as the tenant's door." (456 U.S. 444 at 460; 102 S.Ct. 1874 at 1883.)

with Justice O'Connor's opinion for the majority in TULSA COLLECTION SERVICES v. POPE, *supra.*

> "Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." (99L.Ed.2d 565, at 578)

The seeming inconsistency of those quoted statements can be reconciled by a declaration that in tax foreclosure cases, where the name and address is known and actual notice of process is a person's due, certified mail with return receipt requested or some other form of mailing which provides a receipt must first be attempted; and then, if a receipt is not

forthcoming within a reasonable time, and after diligent attempts, ordinary first class mail will suffice.

3. Implicit in Judge Newman's recognition below of the advantages of use of the mails for actual notice by way of production of a receipt (A-8) is his belief that it will take a decision of this Court to hold such to be the law. (A-1 through A-15)

4. Modern economics have caused the flooding of mailboxes, especially those of the registered property owner with dozens of pieces of junk mail, each trying to outdo the next with an outward appearance of importance. (A-20) Years ago a piece of first class mail might have been sufficiently distinctive to cause its recipient to take notice; in the 1980's the necessity to sign for a piece of certified mail is the equivalent of what a piece of first class mail was fifty years ago. (A-8)

5. The simple device of use of U.S. Mails for the sending of Certified Mail with return receipt requested, Registered Mail, or some other form of mailing which provides a receipt, and, where necessary, a follow-up with a copy by ordinary mail, is an inexpensive method of insuring actual notice to a correspondent. Recognition by this Court of such fact is not and would not be tantamount to a prescription of the form of service; but it would, as was done in GREENE v. LINDSEY, *supra,* for eviction cases, be a holding that a specific form of service in tax foreclosure cases, is insufficient (namely: ordinary mail with no attempt to get a receipt).

6. The matter should not be left for legislation because we are dealing here with Constitutionally-protected minimum standards of due process of law. The recognition of minimum

standards for the preservation of those values is the particular responsibility of this Court. See McCANN v. SCADUTO, *supra*, 71 NY2d 164 at 177, 524 N.Y.S.2d 398 at 404 (quoted supra, p. 20)

7. Required use of certified mail-type notice or other means which, in the ordinary case provides a receipt, does not obviate the necessity for the use of tax foreclosure publication. It remains necessary for cases where the owners' names and addresses are not currently listed, and also for those who remain unable to be contacted after reasonable attempts to get a mailed receipt from them. Nor does such requirement upset the balancing of the equities between a need for an efficient system for collection of taxes vis-a-vie the rights of the taxpayers to due and proper notice. Although the requirement for service of tax foreclosure summons by certified mail, return receipt requested, or other means which provides a receipt, increases the tax collecting authority's costs, those costs are usually charged to the Real Estate anyway.

8. Appellant respectfully urges a clearcut pronouncement of these minimum standards is needed; and, therefore, a writ of certiorari should be granted.

V

AT THE VERY LEAST THIS CASE SHOULD BE REMANDED IN LIGHT OF *TULSA COLLECTION SERVICE v. POPE* SINCE DEFENDANT'S SHORT FOUR-MONTH REDEMPTION PERIOD IS A NON SELF-EXECUTING STATUTE OF LIMITATIONS.

Due process requires that appellant be given "notice by mail or other means as certain to ensure actual notice" of the commencement of the four-month period within which she

could redeem from that foreclosure. TULSA COLLECTION SERVICE v. POPE supra, 99 L.Ed2d 565 at 579 (1988).

Although it is cited by both the majority (A-7) and the minority (A-19) below, *Tulsa* was not decided by this Court until after the case at bar was argued in the Circuit Court of Appeals below. (A-1)

Appellant finds the rule of *Tulsa* to be excellent authority for a point she has urged throughout this case, namely that she could not be held responsible for failure to redeem within the short four-month period after March 15, 1984 (A-4) without, at the very least, a warning notice by mail. (A-11) *Tulsa* requires such notice. (J)

(J) The mailed notice provisions of N.Y. City's In Rem Tax Foreclosure Statute speaks in terms of multiple notices ". . .and any other process required by this chapter. . . ." § 11-416 (c) and § 11-417 (b). No such other process was sent however, nor could any further provision be found within the statute which required that it be sent. Thus the City's foreclosure statute is defective. Even on its own terms a notice such as that required by *Tulsa* is suggested; but none was sent.

CONCLUSION

FOR THESE AND FOR OTHER IMPORTANT BUT LESS COMPELLING REASONS APPELLANT RESPECTFULLY URGES THAT THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IS ERRONEOUS AND SHOULD BE REVIEWED BY THIS COURT AND THAT A WRIT OF CERTIORARI SHOULD BE ISSUED..

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 570—August Term 1987

Argued: January 28, 1988 Decided: July 14, 1988

Docket No. 87-7743

JOSEPHINE WEIGNER,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK,

Defendant-Appellee.

Before:

OAKES, NEWMAN, and MINER,

Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (Henry Bramwell, Judge) granting summary judgment in favor of defendant in a diversity suit challenging the constitutional validity of tax lien foreclosure procedures.

Affirmed. Judge Oakes dissents with an opinion.

EDWARD J. LEDOGAR, West Islip, N.Y., *for plaintiff-appellant.*

RONNIE DANE, New York, N.Y. (Peter L. Zimroth, Corp. Counsel, Pamela Seider Dolgow, Angelo Aiosa, Susan M. Shapiro, New York, N.Y., on the brief), *for defendant-appellee.*

JON O. NEWMAN, *Circuit Judge*:

Josephine Weigner appeals from a judgment of the District Court for the Eastern District of New York (Henry Bramwell, Judge) granting summary judgment against her in a diversity suit challenging the constitutional validity of tax lien foreclosure procedures of the City of New York. Weigner argues that the notice by first class mail furnished pursuant to the City's Administrative Code was inadequate under the Due Process Clause of the Fourteenth Amendment. She argues that, at a minimum, due process requires notice by certified mail, return receipt requested, to property owners who risk tax lien foreclosure of their interests in real estate. Additionally, Weigner contends that the City's notice of foreclosure was inadequate under state law and that the Board of Estimate improperly denied her application for a discretionary release of the City's interest in the property after the deed of foreclosure was entered. We conclude that notice sent by ordinary mail of the pendency of the tax lien foreclosure proceeding is all that the Constitution requires. We also reject Weigner's claims regarding the adequacy of notice under state law and the Board of Estimate's decision to deny a release.

Background

Josephine Weigner is a resident of Florida. Between 1959 and 1962 she acquired a group of 14 vacant parcels of land in South Jamaica, Queens, New York. Weigner failed to pay property taxes on the lots beginning in 1977. On October 1, 1981, the City of New York commenced an *in rem* tax foreclosure action against all real property in Queens on which real estate taxes had not been paid for a year or more. Weigner's 14 lots were among the 5,229 parcels in this proceeding. At the time the action was commenced, Weigner owed approximately $31,000 in back taxes. The market value of the 14 lots is estimated by the parties to be between $151,000 and $250,000.

Pursuant to the City's Administrative Code, notices of the commencement of the tax foreclosure action were mailed to Weigner at her home in Florida. The City had Weigner's address because she had filed with the Commissioner of Finance an "*in rem* card," which enables the City to mail a notice to the designated address in the event that properties listed on the card are included in an *in rem* tax foreclosure action. Administrative Code § 11-417 (Lenz & Riecher 1986). City records reveal that on October 1, 1981, notices of tax lien foreclosure were sent to Weigner by ordinary first class mail.[1] The parties dispute whether Weigner received these notices.[2]

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1 The notices were sent with respect to 13 of the 14 parcels owned by Weigner. The 14th parcel is a narrow strip of land, and Weigner has acknowledged that whatever ruling is made with respect to the 13 parcels for which notice was mailed should govern the 14th parcel.

2 The City presented evidence of its practices concerning the mailing of foreclosure notices. Weigner denies that she ever received legal papers, although she admitted receiving "tax bills and other form letters" concerning overdue taxes on her Queens property.

The "Notice of Foreclosure" sent to Weigner was a form letter that apprised "[a]ll persons having or claiming to have an interest in the real property" described on a list of tax delinquent parcels, that a foreclosure action had been commenced against the parcels. The notice indicated that the property could be redeemed on or before December 18, 1981. The notice further stated that anyone who failed to redeem his property would be "forever barred and foreclosed" of any right in the property "except for the remedies provided in Sections D17-7.0(c) and D17-25.0 of the Administrative Code." Section D17-7.0(c) (now renumbered as section 11-407(c)) permits the late redemption of property after the redemption date, but prior to entry of a judgment of foreclosure. Section D17-25.0 (now renumbered as section 11-424) permits the "release" of the City's interest in property after entry of a judgment of foreclosure. An application for release must be made within two years from the date the City's deed of foreclosure is recorded. A release application made within four months of the City's deed, "shall be granted," provided that it is timely and the applicant pays all back taxes, penalties, and interest. Administrative Code § 11-424(f). An application made after four months and prior to two years is within the discretion of the Board of Estimate. Administrative Code § 11-424(g). *See generally Solomon v. City of New York*, 94 A.D.2d 283, 286-87, 464 N.Y.S.2d 160, 162 (1st Dep't 1983).

Weigner failed to redeem her property by the December 18, 1981, deadline, nor did she request a late redemption. On March 6, 1984, a judgment of foreclosure was entered in the action. The City took title to the properties pursuant to a deed recorded on March 15, 1984. That gave Weigner until July 15, 1984, to apply for a mandatory release and until March 15, 1986, to apply for a discretionary release.

On March 12, 1986, just three days short of the two-year discretionary release deadline, Weigner filed release applications with respect to each of her 14 parcels. After informing Weigner that her case for a discretionary release was weak, giving her an opportunity to submit more evidence, and holding a hearing, the Board of Estimate denied her applications.

Weigner initiated the present suit on October 22, 1986. Her complaint alleged that she received inadequate notice of the foreclosure proceeding and that by denying her release applications the Board of Estimate discriminated against her as an out-of-state resident and otherwise abused its discretion. The District Court granted summary judgment for the City. 668 F. Supp. 135 (1987). The Court found that due process was satisfied because Weigner actually received notices of foreclosure.[3] The District Court further concluded that Weigner's equal protection claim lacked a factual basis and that the Board of Estimate had not abused its wide discretion under state law in denying her release applications.

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3 The District Court's finding that notices were received was limited to the 13 parcels as to which notices had been sent. *See* footnote 1, *supra*. With respect to the 14th parcel, for which notice was not sent, the District Court ruled that Weigner's claim was barred by the two-year statute of limitations. *See* Administrative Code § 11-412(c). Because we hold that due process was satisfied with respect to the 13 parcels for which notices were sent and because Weigner has agreed that the disposition with regard to the 13 parcels should govern the 14th parcel, we need not consider the statute of limitations issue. *See Schroeder v. City of New York*, 371 U.S. 208, 213-14 (1962); *Alliance Property Management and Development, Inc. v. Andrews Avenue Equities, Inc.*, 133 A.D.2d 30, 518 N.Y.S.2d 804 (1st Dep't 1987).

Discussion

A. *Notice*

Weigner contends that summary judgment was improper because there is a disputed issue of material fact as to whether she received the notices of foreclosure that were sent to her. Though Weigner conceded in an affidavit that she received "some tax bills and other form letters from the City of New York" regarding the delinquent parcels, she denied receiving "proper notice" and now claims that she never received the notices of foreclosure. She argues that this is an issue of material fact because the notice provided by the Administrative Code was constitutionally insufficient unless received. Her claim raises the issue whether due process requires that notice of a tax lien foreclosure must not only be mailed to a property owner but also must be received.

Generally, when litigation is initiated to deprive individuals of their property, due process is satisfied by "notice *reasonably calculated*, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added); *accord Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983). The proper inquiry is whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice. As long as the state employs means "such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish [that purpose]," then it has discharged its burden. *Mullane*, *supra*, 339 U.S. at 315. "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that

it is in itself reasonably certain to inform those affected . . . ." *Id.* Importantly, the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated: " 'Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done.' " *Id.* at 319 (quoting *Blinn v. Nelson*, 222 U.S. 1, 7 (1911)); *see Schroeder v. City of New York*, 371 U.S. 208, 214 (1962).

The Supreme Court has frequently said and just recently restated that, under most circumstances, notice sent by ordinary mail is deemed reasonably calculated to inform interested parties that their property rights are in jeopardy. *Tulsa Professional Collection Services, Inc. v. Pope*, 56 U.S.L.W. 4302, 4304 (U.S. Apr. 19, 1988); *Mennonite Board of Missions v. Adams*, *supra*, 462 U.S. at 800; *Mullane*, *supra*, 339 U.S. at 319. The mails are an "efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent. *Mullane*, *supra*, 339 U.S. at 319. In the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process. *See, e.g., Tulsa Professional Collection Services, Inc. v. Pope*, *supra*, 56 U.S.L.W. at 4305 (notice to creditors in probate proceedings); *Mennonite Board of Missions v. Adams*, *supra*, 462 U.S. at 799-800 (notice to mortgagee of tax foreclosure); *Greene v. Lindsey*, 456 U.S. 444, 455 (1982) (notice to public housing tenants of forcible entry and detainer actions); *Schroeder v. City of New York*, 371 U.S. 208, 214 (1962) (notice of condemnation proceeding); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (notice of condemnation proceeding);

Mullane, *supra*, 339 U.S. at 319 (notice to trust beneficiaries of judicial settlement of trust accounts). Though the mails are not one hundred percent reliable, none of these cases requires actual receipt of notice that is properly mailed. *See*, *e.g.*, *Schroeder v. City of New York*, *supra*, 371 U.S. at 214 (City's duty to notify property owner of condemnation proceeding was "an obligation which the *mailing* of a single letter would have discharged") (emphasis added).[4]

Weigner contends that she was constitutionally entitled to notice by certified mail, return receipt requested. No doubt that form of notice would have advantages. The signed receipt would provide virtually conclusive evidence that the notice was received, thereby permitting proof of receipt, if thought to be constitutionally required, to be established on a more substantial basis than simply weighing the inferences from mailing against the property owner's denial. Moreover, the delivery and request for signature of a return receipt would alert the property owner to the fact that the letter contains something of more than routine interest. Indeed, a substantial argument could be made for using such notice for a variety of important items now sent by ordinary first-class mail, for example, the notice from a district court of entry of a judgment, *see* Fed. R. Civ. P.

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4 In some special circumstances, mailed notice may be inadequate. For example, where the state knows that an interested party does not reside at the mailing address, *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Sterling v. Environmental Control Board*, 793 F.2d 52, 57 (2d Cir.), *cert. denied*, 107 S. Ct. 579 (1986), or where the recipient is known to be someone who could not understand mailed notice, *Covey v. Town of Somers*, 351 U.S. 141 (1956), then due process may require more than sending a letter to the address on file. No such special circumstances exist in the present case. The address to which New York City sent the notices was Weigner's home address, which she herself provided in her *in rem* card. Nor is there any suggestion that Weigner was unable to appreciate the significance of the letters that the City sent.

77(d) (authorizing mailed notice and specifying that lack of notice does not warrant relief from failure to appeal).

However, in deciding what the Constitution requires, we are not free to select forms of notice simply because they are advantageous. Even if beneficial, means of notice beyond those reasonably calculated to reach interested parties are not required by due process in the context of foreclosures. *Mullane, supra*, 339 U.S. at 313-14, 317-18. The Supreme Court has repeatedly held that notice by first-class mail is sufficient, notwithstanding the Court's obvious awareness that not every first-class letter is received by the addressee. *See, e.g., id.* at 319. Particularly where mailing is supplemented by other forms of notice such as posting or publication, the risk of non-receipt is constitutionally acceptable. Thus, a landowner's opportunity to learn of condemnation proceedings through notices posted on the land or published in a newspaper circulated in the area in which the land is located, *see Schroeder v. City of New York, supra*, 371 U.S. at 209, or a creditor's opportunity to learn of his debtor's death by notice published by a probate court in the area of the debtor's residence, *see Tulsa Professional Collection Services, Inc. v. Pope, supra*, 56 U.S.L.W. at 4303, reduces the chances that property owners who fail to receive mailed notice will be taken completely by surprise.

In the circumstances of the pending case, the small risk that the notice sent by first-class mail would not arrive is acceptable for two reasons. First, the mailing was not the only device relied upon to give notice. The City published foreclosure notices once a week for six successive weeks in the City Record and in two newspapers circulated throughout Queens County. *See* Administrative Code § 11-406(a). Additionally, notices of foreclosure were

posted in the Queens County courthouse and in three other conspicuous locations in the Borough of Queens. *See* Administrative Code § 11-406(d). The mailing was thus a supplemental form of notice, albeit a necessary one, to the form of notice relied on in an earlier day as the exclusive form of notice. *See Ballard v. Hunter*, 204 U.S. 241, 254-55 (1907); *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U.S. 559, 563-64 (1889). A second reason for tolerating the risk of non-receipt of first-class mail in this case is Weigner's own conduct in failing to pay taxes. The well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of foreclosure. The proceeding in this case was initiated against parcels of real property that had been tax delinquent for over a year. Weigner had failed to pay property taxes for over four years and concedes receiving tax bills and other letters from the City apprising her of her delinquency. A person in Weigner's position can reasonably be expected to know that foreclosure is imminent and to take the steps necessary to protect her interests.[5] Under these circumstances, notice by ordinary mail supplemented by publication and posting was reasonably calculated to inform the parties af-

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5 We do not mean to suggest that a party's ability to take steps to safeguard his interests relieves the state of its constitutional obligation to use notice reasonably calculated to inform interested parties. *See Mennonite Board of Missions v. Adams, supra*, 462 U.S. at 799. However, in making the initial determination of what notice is reasonable, the likelihood that a party will learn of the proceedings without notice from the state and his ability to protect himself are relevant circumstances in determining how extensive the state's notification effort must be. *See Bender v. City of Rochester*, 765 F.2d 7, 11 (2d Cir. 1985).

fected. Due process does not require that notice sent by first-class mail be proven to have been received.[6]

Weigner further argues that the notice provided by the Administrative Code was constitutionally insufficient because she was never informed of entry of the foreclosure judgment or of the imminent lapse of her remedies of mandatory and discretionary release. However, due process only requires notice of "the pendency of the action" and an opportunity to respond. *Mullane*, *supra*, 339 U.S. at 314; *Mennonite Board of Missions v. Adams*, *supra*, 462 U.S. at 795; *see Greene v. Lindsey*, *supra*, 456 U.S. at 451. The City discharged its burden by sending notice that was reasonably calculated to inform interested parties that the foreclosure action had been initiated and to apprise them of the availability of the redemption and release remedies. Once the City sent this notice, it was not required to send additional notices as each step in the foreclosure proceeding was completed or when each of the available reme-

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6 Weigner's insistence that a recent decision of the New York Court of Appeals, *McCann v. Scaduto*, 71 N.Y.2d 164, 524 N.Y.S.2d 398 (1987), imposes a constitutional requirement of certified mailing, is based on a misreading of that case. In *McCann*, the Court of Appeals held that Nassau County's tax foreclosure procedures violated due process. The County's Administrative Code provided for notice to property owners of a tax lien sale by publication only. After the sale, the purchaser of the tax lien was required to inform the property owner of his redemption rights by certified mail, return receipt requested. The Court of Appeals hex sale was a substantial deprivation of property that required mailed or "actual" notice as opposed to published or "constructive" notice to persons whose addresses were known. *Id.* 71 N.Y.2d 177, 524 N.Y.S.2d at 403-04 (citing *Mennonite Board of Missions v. Adams*, *supra*). The opinion is crystal clear that "actual" notice means notice sent to the recipient, as opposed to published notice. *Id.* 71 N.Y.2d at 174, 524 N.Y.S.2d at 402. Nowhere does the opinion suggest that "actual" notice means notice that is in fact delivered, much less notice by certified mail, return receipt requested. Weigner's attempt to construe *McCann* as an expansion of the *Mullane* and *Mennonite* cases on which *McCann* relies is unavailing.

dies was about to lapse. *See Calhoun v. Jennings*, 512 N.E.2d 178, 184 (Ind. 1987); *cf. United States v. Locke*, 471 U.S. 84, 108-110; (1985); *Texaco, Inc. v. Short*, 454 U.S. 516, 536 (1982).

Even if Weigner did not actually receive the initial notices of foreclosure, the City's failure to send additional notice of the release periods was not constitutionally deficient. By the time the mandatory release period lapsed in July 1984, Weigner had failed to pay taxes on her property for over seven years. When the discretionary release period lapsed in March 1986, she had been tax delinquent for almost ten years. Weigner concedes she was aware of her delinquency by virtue of tax bills and other letters the City sent. She should have realized that her failure to pay taxes for such a long period of time would result in a foreclosure, and she could easily have contacted the City at any time to determine the status of her property and to take steps to protect it. In short, the likelihood of the City proceeding against Weigner's property was so certain from the circumstances of her tax delinquency that additional written notice of deadlines to avoid foreclosure was unnecessary. In an analogous context, this Court has held that the failure of the court clerk to mail notice to litigants of the filing of an order in the district court does not relieve a party from complying with deadlines running from the filing of such an order because a party to litigation ought to anticipate the filing of such orders. *See Wakefield v. Northern Telecom, Inc.*, 813 F.2d 535, 541-42 (2d Cir. 1987) (time to file bill of costs); Fed. R. Civ. P. 77(d) (time to file notice of appeal).

In addition to her constitutional claim, Weigner contends that the notice provided by the City was inadequate under state law. Specifically, Weigner asserts that she

should have been furnished with a summons and complaint as provided for in the New York Civil Practice Law and Rules ("CPLR") and with other notices as provided for in the New York Real Property Tax Law. Weigner's claims are without merit because, in tax matters, local ordinances such as the Administrative Code take precedence over the CPLR and the Real Property Tax Law:

> The rule of construction of tax statutes has been entrenched that city charter provisions describing form and procedure should be preferred to the general provisions of the tax laws; only when the city charter is silent as to form and procedure is resort to be made to the general tax laws; and when both the city charter and State tax laws are silent, the provisions of the CPLR or comparable practice statutes may then be applied.

Stevens Medical Arts Building v. City of Mount Vernon, 72 A.D.2d 177, 181-82, 424 N.Y.S.2d 230, 233 (2d Dep't 1980); *see McCann v. Scaduto*, 71 N.Y.2d 164, 171 n.2, 524 N.Y.S.2d 398, 400 n.2 (1987); *People ex rel. Savory, Inc. v. Plunkett*, 295 N.Y. 180, 182-83 (1946); N.Y. Real Prop. Tax Law § 2006 (McKinney Supp. 1988). Since the Administrative Code contains specific provisions regarding notice of tax foreclosure proceedings, the Real Property Tax Law and the CPLR do not apply. *See McCann v. Scaduto, supra*, 71 N.Y.2d at 171 n.2, 524 N.Y.S.2d at 400 n.2 (declining to supplement local tax sale notice provisions with requirements of Real Property Tax Law and CPLR).

B. *Denial of Release*

Weigner contends that the Board of Estimate's denial of her release application was improper. Primarily, she ar-

gues that the denial was unlawful because other applicants "less worthy" than she were granted releases. She also alleges that the Board discriminated against her as an out-of-state resident, and she even suggests that the Board denied her application because she refused to pay bribes. We agree with the District Court that these contentions are without merit.

The Board of Estimate has virtually unlimited discretion under Administrative Code § 11-424(g) (formerly section D17-25.0(g)) whether to grant a release application such as Weigner's that is filed after the four-month mandatory release period has expired. *Solomon v. City of New York*, *supra*, 94 A.D.2d at 286-87, 464 N.Y.S.2d at 152; *Sixteen Eighty West 7th Corp. v. Board of Estimate*, 109 A.D.2d 799, 800, 486 N.Y.S.2d 311, 312 (2d Dep't 1985); *see Dwyer v. Lindsay*, 23 N.Y.2d 562, 564-65, 297 N.Y.S.2d 942, 943-44 (1969). In considering the application, the Board may look at the length of the underlying tax delinquency, the amount of unpaid taxes, and the reasons for nonpayment. *See Dwyer v. Lindsay*, *supra*, 23 N.Y.2d at 565, 297 N.Y.S.2d at 944; *Solomon v. City of New York*, *supra*, 94 A.D.2d at 286-87, 464 N.Y.S.2d at 162. Moreover, the Board is prohibited from releasing the property if the City has sold it, the property has been condemned or assigned to a City agency, or the property is the subject of contemplated use for any capital or urban renewal project. Administrative Code § 11-424(g). The Board need not give reasons for its ultimate decision. *Solomon v. City of New York*, *supra*, 94 A.D.2d at 287, 464 N.Y.S.2d at 162.

The Board acted within its discretion in denying Weigner's application. At the time of the Board's consideration, the property had been tax delinquent for over nine years, and Weigner had no explanation as to why she had

failed to pay other than that payment had become "financially inexpedient." Moreover, Weigner did not occupy the property, nor did she have any plans to develop it in a useful way. Finally, the City was considering using the land for a housing program. Under these circumstances, the Board was fully justified in denying the release.

We reject Weigner's remaining claims for substantially the reasons set forth in the District Court's opinion. The Board was entitled to consider the fact that Weigner was an absentee landowner, and there is no evidence that the Board discriminated against her because she was an out-of-state resident as opposed to an absentee owner who lived within the state. Similarly, Weigner's claim that her release application was denied for failure to pay bribes or for other improper motives is wholly unsupported in the record.

The decision of the District Court granting summary judgment to the City of New York is affirmed.

OAKES, *Circuit Judge* (dissenting):

I dissent.

I believe that the procedures followed by New York City in conducting tax foreclosure sales are constitutionally invalid for two reasons. First, the City's Administrative Code does not give a landowner sufficient notice of foreclosure proceedings. Second, the "release" provisions, which place the approval of certain applications wholly within the "discretion" of the Board of Estimate, are totally arbitrary. Here both deprived Weigner of procedural due process and of equal protection of the laws.

The City provides service of a "Notice of Foreclosure" by ordinary first class mail. N.Y.C. Admin. Code § 11-417 (Leng & Reicher 1985). With all the vagaries of the postal service in the 1980s, the notice provided to out-of-state New York City property owners whose property is the subject of foreclosure proceedings is less reliable than that provided to out-of-state property owners in a wide variety of other circumstances. So, for example, a nonresident whose real estate is sold to pay a judgment debt, N.Y. Civ. Prac. Law § 5236(c) (McKinney 1978 & Supp. 1988), or one on whose personal property execution is levied to pay a money judgment, *id.* §§ 5225, 5232, or a person who owes money or who will owe money to a judgment debtor and is served with a restraining notice, *id.* §§ 5222, 5227, or a judgment debtor on whom is served an information subpoena, *id.* § 5224, is guaranteed service personally or by registered or certified mail, return receipt requested. I fail to see why tax foreclosure matters should be treated differently.

Recently the New York Court of Appeals considered a somewhat similar question in *McCann v. Scaduto*, 71 N.Y.2d 164, 519 N.E.2d 309, 524 N.Y.S.2d 398 (1987). There the court found unconstitutional the Nassau County tax foreclosure system, which provided notice of the tax sale itself only by publication and had no requirement for actual notice until three months before the redemption period expired. In a compelling opinion by Judge Kaye, the court concluded that the tax lien sale "creates 'momentous consequences' for the homeowner," and that "[a]ctual notice" of it is required. *Id.* at 177, 519 N.E.2d at 314-15, 524 N.Y.S.2d at 404. Judge Kaye's opinion did not specify that "actual" notice need be by registered or certified mail; however, in light of both the evolving due process standards for adequacy of notice and the practical realities

of being a postal patron in the late 1980s, I would take the further step of requiring that actual notice consist of personal service, registered or certified mail, or, at a minimum, of service by first class mail with a return envelope, postage prepaid and addressed to the sender, as specified in Fed. R. Civ. P. 4(c)(2)(C)(ii) & 4(d).[1] Although the Supreme Court has yet to be squarely presented with the question whether certified or registered mail, as opposed to first class mail, is required to constitute actual notice, I think that a discernible trend toward this position, coupled with the Court's recognition of property rights as personal rights, *e.g.*, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), make its adoption a matter only of time.

Judge Kaye's opinion in *McCann* ably recounts that trend. Starting with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court rejected any rigid distinctions between in rem and in personam proceedings, *id.* at 312-13, and articulated that "[a]n elementary and fundamental requirement of due

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1 Significantly, the Advisory Committee and the Supreme Court had approved of an amendment that would permit service referred to in Rules 4(d)(1) and 4(d)(3) by registered or certified mail, return receipt requested, and Congress instead adopted the substitute found in the Rule. *See* 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1092.1, at 56 (1987). Although "in the usual situation [in class action suits] first-class mail and publication in the press fully satisfy the notice requirements of Fed. R. Civ. P. 23 and the due process clause," *Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985), notice by certified mail may be preferable where the intended recipient lacks legal expertise. For example, one court which found that notice by first class mail in a class action suit was " 'reasonably calculated . . . to apprise interested parties' " where the class consisted of business entities with legal expertise also recognized that "[m]ore elaborate steps, such as certified mail, [may be appropriate] . . . where class members may be presumed to be less aware of a notice's legal ramifications." *Id.* at 92 (quoting *Mullane*, 330 U.S. at 314).

process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *id.* at 314, and that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. In following years the Court held that constructive notice of condemnation proceedings was inadequate to notify a landowner whose identity was known to the city, *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Schroeder v. City of New York*, 371 U.S. 208 (1962) (publication *and* posting insufficient notice of condemnation proceedings to landowner ascertainable from public records), and that the posting of a summons on an apartment door was insufficient notice of a forcible entry or detainer action, *Greene v. Lindsey*, 456 U.S. 444 (1982). In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Court held that posting in county courthouse and publication does not provide a mortgagee adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. Through this progression, the Court has come to recognize as a general principle that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite*, 462 U.S. at 800. (Here Weigner's name and address were known to the City, she having completed an "*in rem* card.") The Court went on to say, "a mortgagee's [and presumably a mortgagor's] knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Id.* Thus, for purposes of notice, a delin-

quent real estate taxpayer stands in no different shoes from a judgment debtor. The trend continues. In *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988), the Court required the service of actual notice in probate proceedings.

Several lower courts have acknowledged that certified or registered mail is preferable to first class mail as a means of notice because the certified or registered mail, if signed for, guarantees receipt, *see Stateside Mach. Co. v. Alperin*, 591 F.2d 234, 241 (3d Cir. 1979), *superseded by statute as explained in Gold Kist, Inc. v. Laurinburg Oil Co.*, 756 F.2d 14, 17-18 (3d Cir. 1985) (state rules now require service of process by certified or registered mail), and provides documentary evidence of receipt. *United States v. Smith*, 398 F.2d 173, 177 (3d Cir. 1968). In recognition of these advantages, registered or certified mail is now the preferable means for notice in a variety of contexts, not only in New York. For example, several states require notice by registered or certified mail before tax foreclosure, e.g., Wash. Rev. Code § 84.64.050 (1987), or mortgage foreclosure, e.g., D.C. Code §§ 45-715(b), 45-715.1; *see also* 12 C.F.R. § 590.4(h)(1) (1985) (Federal Home Loan Bank Board requires thirty days' notice prior to foreclosure to be sent by registered or certified mail). Similarly, mortgage agreements frequently specify notice by certified mail prior to foreclosure. *E.g.*, *United States v. Victory Highway Village, Inc.*, 662 F.2d 488, 493 (8th Cir. 1981).

The facts of this case show why notice by certified or registered mail is necessary. Here the parties dispute whether the notice was ever received. Weigner, a widow living in Florida, owned property in a rundown section of Queens. She had paid her taxes up to 1977 (and 1980 as to

one parcel) except for a brief period when she held the property as mortgagee, having sold it to an unsuccessful developer, and even then she paid back taxes when she reacquired it from the buyer. Actual arrearages were only $9,259, although $21,927 in interest, subsequent taxes, penalties, etc., was owed on the property which was worth, in the 1980s, $183,000 according to the City and more than $250,000 according to Weigner. The notice (which she does not remember receiving) was a form letter on which her name does not appear, her pieces of property are not specified, and the word "summons" is conspicuously absent. The form "notice of foreclosure" simply refers to "In Rem Tax Foreclosure Action No. 38" in the Borough of Queens and says that the Commissioner of Finance has filed with the clerk of a court "a list of parcels of property affected by unpaid tax liens . . . which on the 1st day of October, 1981, had been unpaid for a period of at least one year" and went on to specify, in writing-like typeface, December 18, 1981, as the last day for redemption. Queens Action No. 38 involved, I note, 5,229 tax delinquent parcels.

In our current society, when our mailboxes are usually full of quite sophisticated, and often personalized, "junk mail," it is not unlikely that the form letters sent by the City were simply thrown away by Weigner. Similarly, the fact that she allegedly received thirteen such notices might have led her to disregard all of them because there were so many. More importantly, had she opened the letters and worked her way through the somewhat abstruse and tortured legalese, she might not have realized that it was in fact a summons that she had received. (I note that had she been the out-of-state recipient of a summons announcing the start of a legal action, she would have been entitled to *personal* service. N.Y. Civ. Prac. Law §§ 313, 314 (Mc-

Kinney 1972 & Supp. 1988).) It is not unreasonable for an individual to expect that an important legal document will include his or her name and will describe with some particularity the subject of the dispute. To my mind the notices simply did not constitute, in the words of *Mullane*, a means "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. Rather, the City appears to have been trying to satisfy some perceived minimum standard rather than making a good faith effort to provide actual notice. Moreover, the City did *not* send *any* notice of the entry of the foreclosure judgment, any notice of the recording of the tax foreclosure deed, or any notice of the pending expiration of Weigner's rights to redeem within the four-month mandatory release period thereafter. This dissenting opinion may be a little in advance of its time but, I suggest, very little. Indeed, it has been anticipated by *Miles v. District of Columbia*, 354 F. Supp. 577, 583-85 (D.D.C. 1973), *aff'd*, 510 F.2d 188 (D.C. Cir. 1975). *See also* Kirst, *Nebraska's Modern Service of Process Statute*, 63 Neb. L. Rev. 1, 6 (1983).

The other basis for unconstitutionality of the city foreclosure procedures is more direct. New York City Administrative Code section 11-424(g) permits the Board of Estimate in its "discretion" to authorize the "release" of the City's interest in the property foreclosed to the taxpayer who properly applies and pays all due charges during the period from four months to twenty-four months after the deed of foreclosure is recorded. (For the first four months there is a mandatory release.) The only restraint on this discretion is that it cannot be exercised if the City has sold or disposed of the property, if the property has been condemned or assigned to any agency of the City, or if it is the "subject of contemplated use for any capital

or urban renewal project of the city." Weigner duly filed her applications for release but, according to the City's affidavit in support of its motion for summary judgment, she was turned down because the vacant land was "on disposition hold" because it was submitted to the Mayor's office as "potential Affordable House Sites" and because she lacked any plans for the sites.

To my mind, despite the City's admirable goal of using the foreclosed land for affordable housing, the untrammeled discretion of the Board makes the City's action arbitrary. To be sure, it can be argued that the period for the "release" application could be shortened, for example, to four months, and that would eliminate the problem of arbitrariness. But I rather thought the right-privilege distinction had been interred,[2] or at the very least that when government agencies take actions affecting valuable property rights there must be standards for the exercise of administrative discretion. Judge Henry Friendly spoke of the need for such standards as early as 1962 in *The Federal Administration Agencies: The Need for Better Definition of Standards* 5-6 (1962), *selected chapters reprinted in Benchmarks* 86-134 (1967). Professor Kenneth Culp Davis devotes a chapter in his 2 *Administrative Law Treatise* ch. 8 (2d ed. 1979) to the subject. Case law in the Supreme Court, *Morton v. Ruiz*, 415 U.S. 199, 231, 232, 236 (1974) (determination of eligibility for welfare benefits), and in this court, *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) (selections among applicants for public housing); *McClendon v. Rosetti*, 460 F.2d 111 (2d Cir. 1972) (disposition of property in police custody), requires that decisions be made according to articulated standards, not by unfettered administrative discretion. *See*

2 *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

also White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976) ("vesting virtually unfettered discretion in [Town Supervisor]" with no "published standards for eligibility or the amount of aid given," *id.* at 751).

Here, I believe that the actions of the Board were arbitrary. The lack of standards, coupled with the fact that the Board is not required to give its reasons for its ultimate decision, creates a situation where an applicant must guess at the arguments to be made to the Board, and will often never know why an application has been accepted or denied. Weigner's complaint made out a colorable claim of arbitrariness, and she should have been allowed discovery on the question of whose applications were approved and whose were not. The practical result of this case is that the City of New York, through suspect procedures and arbitrary administrative actions, has gained possession of property worth between $183,000 and $250,000, because an elderly out-of-state widow failed timely to pay less than $10,000 in property taxes. Because the City has failed to live up to its constitutionally-mandated duties, I dissent.

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

MANDATE

EDNY
86-CIV-3602
BRAMWELL

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July one thousand nine hundred and eighty-eight.

Present: Hon. James L. Oakes
Hon. Jon O. Newman
Hon. Roger J. Miner

Circuit Judges

United States Court of Appeals
Filed
Jul 14 1988
Elaine B. Goldsmith, Clerk
Second Circuit

JOSEPHINE WEIGNER,

Plaintiff-Appellant,

—V—

THE CITY OF NEW YORK

Defendant-Appellee.

87-7743

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

A TRUE COPY
ELAINE GOLDSMITH
Clerk

ISSUED AS MANDATE: Aug. 8, 1988

APPENDIX C-1

OPINION, U.S.D.C. Eastern District of N.Y.

WEIGNER v. CITY OF NEW YORK
Cite as 668 F.Supp. 135 (E.D.N.Y. 1987)

Josephine WEIGNER, Plaintiff,

v.

The CITY OF NEW YORK, Defendant.

No. CV-86-3602.

United States District Court,
E.D. New York.

July 31, 1987.

Edward J. Ledogar, West Islip, N.Y., for plaintiff.

Peter L. Zimroth, Corp. Counsel of City of New York, New York City (Susan M. Shapiro, Asst. Corp. Counsel, and Angelo Aiosa, of counsel), for defendant.

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT

BRAMWELL, District Judge.

Plaintiff commenced this action against the City of New York alleging violation of her constitutional rights and other improprieties in connection with the City's tax foreclosure action against plaintiff's property in Jamaica, Queens, and the City's subsequent denial of plaintiff's application for release

of the City's interest in the property. This morning, defendants move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in their favor. For the reasons that follow, the motion is granted.

The undisputed material facts may be summarized as follows:

On October 1, 1981, the City commenced an *in rem* tax foreclosure action against all real property in Queens that was tax delinquent for one year or more. Among the 5229 tax delinquent parcels in that foreclosure action were 14 vacant parcels owned by plaintiff, 13 of which had been tax delinquent since 1977, and the remaining one since 1980. Plaintiff, a resident of Florida, had owned the lots since at least 1962. At the time, the total tax delinquency for all 14 parcels was approximately $31,000.

Notices of commencement of the tax foreclosure action were mailed by ordinary mail and received by plaintiff with respect to 13 of the parcels, but not with respect to the fourteenth. On March 6, 1984, a judgment of foreclosure was signed by Justice Cooperman of Queens County Supreme Court and the City took title to all parcels therein, including plaintiff's 14 parcels, pursuant to a deed duly recorded on March 15, 1984. In the 2½ years during which the foreclosure proceeding was pending, plaintiff took no steps to avoid foreclosure or redeem the parcels by paying her delinquent taxes.

On March 13, 1986, just short of two years after the City recorded its deed, plaintiff filed an application pursuant to the Administrative Code of the City of New York for release of the City's interest in each of her 14 parcels. Because the parcels were vacant and deemed suitable for a housing program, the

Division of Real Property of the New York City Department of General Services (DRP) concluded that the Board of Estimate should deny plaintiff's release applications.

On or about June 19, 1986, officials of DRP informed plaintiff's attorney that DRP intended to recommend that the Board of Estimate deny plaintiff's applications for release because plaintiff was "not making a strong enough case for redemption." The DRP officials advised plaintiff's counsel to submit additional arguments and documentation in support of plaintiff's application.

On September 25, 1986, after hearing a brief presentation from plaintiff's attorney and a brief presentation from a representative of DRP, the Board of Estimate, through its member's respective representatives, and in accordance with DRP's recommendation, unanimously adopted a resolution denying plaintiff's application for release, finding that release of the City's interest in the parcels would not be in the City's best interests. Plaintiff thereafter commenced this case on October 23, 1986.

The fair market value of the property at issue is estimated by the parties to be anywhere between $151,000 and $325,000.

[1] Under section 11-424 of the Administrative Code of the City of New York, any party who had an interest in property acquired by the City through a tax foreclosure may file an application for release of the City's interest at any time within two years following the recording of the deed in the City's name. If such an application is made within the first four months of the two-year period, the application must be granted once the Corporation Counsel approves the application as to form, timeliness, and eligibility. Any application

filed during the balance of the two-year period may be approved by the New York City Board of Estimate in the exercise of its discretion. *See generally In re Tax Foreclosure #35*, 127 A.D.2d 220, 514 N.Y.S.2d 390 (App.Div. 2d Dept.1987); *Solomon v. NYC Dept. of General Services*, 94 A.D.2d 283, 464 N.Y.S.2d 160 (1st Dept.1983). Thus, New York courts have held that the discretion of the Board of Estimate, when reviewing applications filed after the first four months of the two-year period, is virtually absolute, or at lease limited only by the Board's own judgment and conscience.

(2, 3) In the present case, plaintiff filed her application for release only two days before the two-year period was to expire. Hence, her application was left solely to the discretion of the Board of Estimate. Given that plaintiff had a substantial tax delinquency and that the DRP recommended denial of the application on the basis that the vacant property could be used for a housing program, the Board acted rationally and well within its discretion in denying the application as not being in the best interests of the City. Moreover, plaintiff has produced insufficient evidence as a matter of law to support her contention that the application was denied due to her attorney's refusal to pay illegal consideration, or bribes, to DRP personnel. Plaintiff's sole evidence that bribes were solicited is that the DRP officials told her attorney that DRP would recommend denial of the application unless plaintiff could present "a stronger case." Standing alone, these words could not permit a reasonable jury to find that plaintiff's application was denied for failure to pay a bribe.

Because the City acted in accordance with the law and within its discretion, plaintiff's claims are meritless to the extent they allege a failure to conform to its own statutory procedures and general unfairness and injustice.

[4] The remainder of plaintiff's complaint asserts violations of plaintiff's rights to procedural due process and equal protection of the laws. The equal protection claim requires little discussion. Plaintiff has presented not a scintilla of evidence to support her conclusory allegation that her application was denied due to her residency in Florida. Although the City appears to concede that absentee landowners might be looked upon less favorably than landowners who live on the foreclosed property, that distinction is a reasonable one, and in no way indicates that out-of-state absentees were treated any differently than in-state absentees. In short, there is no evidence in the record thus far presented from which a reasonable factfinder could conclude that plaintiff was discriminated against on the basis of her Florida residency.

Finally, plaintiff's procedural due process claim presents a closer question. Although plaintiff asserts that she was denied an adequate hearing on her application for release, it is clear that she had an ample opportunity to present her case both orally and in writing. On the issue of adequacy of notice, plaintiff does not dispute that she received actual notice by mail of the commencement of the tax foreclosure action with respect to 13 of her 14 parcels, but even the City concedes that no actual notice was given or received with respect to the 14th parcel. Plaintiff further argues that due process required that she be notified of the recording of the deed in the City's name, and of her rights to file an application for release under the Administrative Code, and specifically of her right to apply for mandatory release within the first four months after the deed was recorded.

[5, 6] Because plaintiff does not dispute that she in fact received actual notice by mail of the tax foreclosure proceeding with respect to 13 of her parcels, her due process

claim is meritless with respect to these parcels. Actual notice of the commencement of the proceeding is all due process required. To the extent plaintiff's due process claim challenges the foreclosure itself, the notice by mail clearly satisfied due process, and, in any event, as will be discussed below with respect to parcel 14, the claim would be time-barred. To the extent that the due process claim challenges the City's notice and procedure after recording its deed, the claim must also fail. Since under New York law a property owner "is charged with knowledge of statutory provisions affecting the control or disposition of her property," *see, e.g., Sheehan v. Suffolk County*, 67 N.Y.2d 52, 58, 499 N.Y.S.2d 656, 490 N.E.2d 523 (1986), and since plaintiff took no action to protect her rights during the foreclosure proceedings, due process did not require any further notice of the recording of the deed or of plaintiff's statutory right to apply for a release. Moreover, it has been held that one's right to apply for release of the City's interest in property is a product of legislative grace, rather than a property right triggering procedural due process protections. *Lewis v. Schwartz*, 119 A.D.2d 32, 506 N.Y.S.2d 32 (1st Dept.1986). In any event, the notice plaintiff did receive, advising her of the commencement of the foreclosure action, in fact refers to her rights under the then-controlling provisions of the City Administrative Code governing applications for release after foreclosure, and warns that plaintiff would otherwise be "forever barred and foreclosed of all [her] rights." Thus, with respect to the 13 parcels for which plaintiff does not dispute receiving actual notice by mail of commencement of the foreclosure proceedings, there was no violation of due process.

[7] Turning to the 14th parcel, concerning which even the City concedes plaintiff did not receive actual notice of the foreclosure proceedings, the Court agrees with the City that

plaintiff's due process claim, to the extent it challenges the foreclosure action itself, is barred by the two-year statute of limitations contained in section 11-412 of the City Administrative Code. Section 1-412 creates a presumption that the tax foreclosure action and all proceedings therein and prior thereto, from and including the assessment of all lands affected and all notices required by law, were regular and in accordance with the law. The presumption becomes conclusive two years after the date of the recording of the deed, thereby effectively operating as a two-year statute of limitations. Under New York case law, the only exception to this two-year statute of limitations is where the tax foreclosure proceeding is itself void, or a nullity, for example where the taxes had in fact already been paid, or been improperly levied, or been erroneously assessed, when the proceeding was commenced. *See, e.g., Cameron Estates v. Deering,* 308 N.Y.24, 123 N.E.2d 261 (1954); *Carolan v. Fieber,* 6 Misc.2d 229, 163 N.Y.S.2d 830 (Sup.Ct. Queens County 1957) *aff'd,* 7 N.Y.2d 916, 197 N.Y.S.2d 481, 165 N.E.2d 428 (1960). Other defects in the foreclosure proceedings, including deficient notice and other constitutional and jurisdictional defects, render the proceeding only "voidable," and do not affect the two-year statute of limitations. *See, e.g., In Rem Tax Foreclosure #29,* 115 Misc.2d 663, 454 N.Y.S.2d 919 (Sup.Ct.N.Y. County 1982); *Doud v. Huntington Hebrew Congregation,* 178 A.D. 748, 165 N.Y.S. 908 (2nd Dept.1917).

In the present case, the complaint was filed more than two years after the deed was recorded in the City's name. Thus, because plaintiff admits that she was delinquent on her taxes, and does not otherwise contest the underlying tax assessment, she is barred by the two-year statute of limitations from challenging the City's foreclosure against the 14th parcel. To the extent plaintiff's due process claim challenges the City's

denial of her application to release the City's interest in the 14th parcel, or the notice and hearing she received in connection therewith, the claim is meritless for most of the reasons stated above in connection with the other 13 parcels.

Based on the foregoing analysis, therefore, the City's motion for summary judgment is GRANTED, and the Clerk of the Court is instructed to enter an order of dismissal in this case.

APPENDIX D

JUDGMENT OF HON. HENRY BRAMWELL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSEPHINE WEIGNER,

Plaintiff,

—against—

CITY OF NEW YORK,

Defendant.

JUDGMENT
CV 86-3602 (RB)

An order of Honorable Henry Bramwell, United States District Judge, having been filed on July 31, 1987, dismissing the action without prejudice, and without costs, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant, and that the action is hereby dismissed without prejudice and without costs.

ROBERT C. HEINEMANN
Clerk of the Court

By: James Giokas
Chief Deputy

Dated: Brooklyn, New York
July 31, 1987